Supreme Court, U.S.
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No. ___ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES *EX REL.* SUSAN J. SWIFT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The False Claims Act (FCA) prohibits a variety of fraudulent or deceptive practices involving government funds and property. 31 U.S.C. § 3729 *et seq*. The Department of Justice (DOJ) "diligently shall investigate" violations and "may bring a civil action" if it finds that a person has violated or is violating the Act. 31 U.S.C. § 3730(a). The FCA also authorizes a private individual, called a "relator," to bring a *qui tam* action "for the person and for the United States Government" and to share in any recovery of civil penalties and treble damages. 31 U.S.C. §§ 3730(b)(1), (d)(1)-(2). DOJ may dismiss a *qui tam* action, over the objection of the relator, after the court has afforded her an opportunity for a hearing on the motion. 31 U.S.C. § 3730(c)(2)(A).

The questions presented are:

1. Whether the FCA authorizes DOJ to dismiss a meritorious *qui tam* action without first conducting the statutorily mandated diligent investigation necessary to determine the extent of the fraud.

2. Whether the FCA authorizes DOJ to dismiss a meritorious *qui tam* action in which the United States has not intervened and, hence, is not a party.

3. Whether Petitioner was denied a fair hearing on DOJ's motion to dismiss because, *inter alia*, the hearing was held *in camera*, and Petitioner was denied all discovery relevant to the critical question of whether the motion was arbitrary and capricious, based on improper considerations, or otherwise illegal.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 318 F.3d 250. The district court's opinion (App., *infra*, 9a-28a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2003. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

31 U.S.C. §§ 3729, 3730, which are set forth in their entirety in the appendix. App., *infra*, 29a-38a. In particular, 31 U.S.C. § 3730(c)(2)(A) of the False Claims Act provides in pertinent part:

> (c) Rights of the Parties to Qui Tam Actions.—
>
> * * * *
>
> (2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

STATEMENT OF THE CASE

This petition seeks to remedy DOJ's arbitrary, capricious, improperly-motivated, and procedurally-illegal dismissal of a meritorious *qui tam* action filed by Petitioner, on behalf of herself and the United States, against three former managerial employees of the Office of Legal Counsel (OLC) in DOJ.

This case amply demonstrates that DOJ is not willing to address fraud allegations involving its own senior management. This is precisely the type of problem that the FCA's

qui tam provision was designed to remedy. This Court should accept the petition for certiorari to address DOJ's attempts to manipulate the FCA. Holdings by this Court on the meaning of those FCA provisions mandating DOJ investigations, and requiring a timely intervention decision, are necessary to give relators the information they need. The court of appeals reached the wrong result on both these issues. This Court should accept certiorari so that both relators and the government will know what is expected of them.

Statement of Facts.

Because the case was decided on a motion to dismiss, and DOJ conceded below that the fraud claim was meritorious for purposes of the motion, the facts alleged in the Amended Complaint are presumed true on appeal. Indeed, these facts have never been disputed.

Petitioner is a GS-15 attorney-advisor currently assigned to DOJ's Civil Rights Division. Petitioner graduated from Yale Law School in 1983, was associated with a major New York City law firm, was appointed an Assistant Professor of Law at the University of Oregon Law School, and served as a Special Assistant to the General Counsel of the United States Environmental Protection Agency. During the last year of the Administration of George H.W. Bush, former Assistant Attorney General Timothy E. Flanigan employed Petitioner as a GS-14 attorney-advisor in OLC. After only 9 months of service, Petitioner had earned an "outstanding" on her performance appraisal, a promotion to GS-15, and a substantial merit bonus.

In 1992, while assigned to OLC, Petitioner learned that two OLC managerial employees—former Principal Deputy Assistant Attorney General Douglas R. Cox, and former Executive Officer Kathleen O. Murphy—participated in a scheme involving the use of annual leave that defrauded American taxpayers.

Specifically, OLC participated in DOJ's "compensatory time" (comp-time) program, which gave eligible employees nonmonetary compensation for overtime hours worked by allowing those overtime hours to be used in lieu of sick leave or annual leave. Murphy, who had responsibility for OLC's time sheets and leave slips, admitted that she allowed Cox to participate in the comp-time program, even though as a Senior Executive Service (SES) employee, he was not eligible. By way of example, Murphy explained that Cox had once charged a three-week vacation against comp-time rather than annual leave.

On December 11, 1992, Petitioner reported to former Assistant Attorney General Flanigan, that Murphy did not deduct annual leave from the account of one of his deputies when he went on vacation. Flanigan took no apparent action regarding the reported fraud. Instead, he retaliated against Petitioner by attempting to terminate her employment.

The Amended Complaint further alleges that when Cox—a political appointee—left OLC at noon on January 20, 1993, he converted his unused annual leave hours to its cash equivalent. Because the comp-time fraud allowed him to accumulate annual leave to which he was not entitled, he received a cash payment in an amount greater than he should have.

As a direct result of Flanigan's retaliatory efforts to terminate her employment, Petitioner became embroiled in litigation against DOJ under the Privacy Act, Title VII, and the Merit Systems Protection Act. These actions finally settled in 1997, and as a result DOJ voided *ab initio* the adverse personnel action that Flanigan had commenced against her.

While Flanigan's retaliatory efforts to terminate Petitioner's employment ultimately failed, in the process, Murphy generated a signed declaration in which she admitted the

essential allegations of the Amended Complaint. The personnel matter finally resolved, Petitioner turned her attention back to the OLC time sheet fraud that DOJ appeared to have overlooked.

Proceedings Below.

Because much of this appeal involves procedural issues, a detailed procedural history is set forth below.

United States ex rel. Swift v. Flanigan began on January 19, 1999, when Petitioner filed a Complaint—on behalf of herself and on behalf of the United States—under the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. § 3730(b)-(f). The Complaint alleged that one current and two former OLC managerial employees defrauded and conspired to defraud the United States in connection with the submission of false time sheets and leave slips.

Petitioner strictly adhered to the *qui tam* provisions' procedural requirements. She filed her Complaint *in camera* under seal. 31 U.S.C. § 3730(b)(2). She served a copy of the Complaint on the Attorney General and the United States Attorneys Office for the District of Columbia, along with a required Disclosure Statement (App., *infra*, 39a-54a) detailing the material evidence and information in her possession. The DOJ attorney assigned to the case assured Petitioner that he would contact her before taking any action on her Complaint.

DOJ did not, however, adhere to the *qui tam* provisions' procedural requirements. DOJ did not diligently investigate the evidence showing a violation of 31 U.S.C. § 3729, as mandated by 31 U.S.C. § 3730(a). Neither did DOJ exercise its option to either intervene or decline to intervene on behalf of the United States pursuant to 31 U.S.C. § 3730(b)(2). Instead, on April 2, 1999, without first contacting Petitioner as had been promised, DOJ unexpectedly moved to dismiss Petitioner's *qui tam* claims. The stated justification was

(1) the dollar amount of any recovery would be *de minimis* and (2) DOJ has absolute power to dismiss a *qui tam* case filed by one private person against other private persons as a matter of "prosecutorial discretion." [1]

On April 26, 1999—35 days after the expiration of the statutory 60-day seal period—DOJ requested that Petitioner's *qui tam* suit be "maintained" under seal, making no effort to show "good cause" as required by 31 U.S.C. § 3730(b)(3). The district court granted DOJ's unopposed application.

Petitioner opposed DOJ's dismissal motion and requested an evidentiary hearing pursuant to 31 U.S.C. § 3730(c)(2)(A) to determine whether DOJ's decision to dismiss was arbitrary, capricious, fraudulent or motivated by improper considerations. DOJ opposed the evidentiary hearing.

On February 23, 2000, the district court filed an Order, miscaptioned *Swift v. Flanigan*, which directed the "parties" to meet and confer on the issues enumerated in Local District Court Rule 16.3. The case remained under seal and, thus, Petitioner was prohibited from contacting defendants Flanigan, Cox and Murphy who had, in any event, not yet been served. In an effort to nonetheless comply with the Order, Petitioner contacted the DOJ attorney assigned to the case. He refused to "meet and confer," asserting that—because DOJ had not intervened on behalf of the United States—the United States was not a "party." Therefore, there was no basis to "meet and confer." Petitioner made a good faith effort to comply with the Order by submitting a unilateral response in which she reminded the district court that the case remained under seal and that the defendants had not yet been served. She also reported DOJ's refusal to "meet and confer"

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[1] In the alternative, DOJ "suggested" dismissal of Flanigan and Cox, former members of the Senior Executive Service, on jurisdictional grounds.

because the United States had not intervened and was therefore not a "party."

The district court then issued a properly captioned Order requesting further briefing from Petitioner and from the United States. The Order directed Petitioner to describe the nature and purpose of the evidentiary hearing and to submit a proposed witness list. The Order directed DOJ to respond to the disparity in estimated damages and to submit a proposed witness list as well. Petitioner complied with this Order. DOJ complied with the district court's first directive, and stated that it would proffer no testimony at any evidentiary hearing.

On July 17, 2000, the district court held a status hearing at which Petitioner was represented by newly-retained counsel. At the hearing, the district court requested information concerning DOJ's normal procedures for handling allegations of fraud against federal employees—DOJ employees and other federal employees—where a *qui tam* citizen enforcement action has been filed and where no *qui tam* action has been filed. The district court also asked for information concerning whether DOJ's normal practice is consistent with "what DOJ should be doing"; whether there had been a deviation from that normal practice in the instant case, including a deviation from the standards and protocols for investigating and assessing *qui tam* claims; and whether DOJ's handling of employee fraud is consistent with "good government." In addition, the district court requested information regarding whether DOJ normally relies on cost-benefit analyses in fraud cases where no *qui tam* action has been filed. The district court also asked for information concerning other federal agencies' normal procedures for handling such allegations and whether they, in fact, follow such procedures. Finally, the district court requested policies, procedures, and other materials that normally inform DOJ's decision-making process.

DOJ conceded the fraud for purposes of the motion to dismiss. Consequently, the district court concluded that there was no need to explore whether DOJ had, in fact, investigated Petitioner's allegations. Nevertheless, the district court indicated that DOJ's failure to investigate would be relevant to the extent that it helped demonstrate that DOJ had deviated from its normal standards and practices. The DOJ attorney repeatedly assured the district court that he would look into the matter.

The district court set briefing dates for what it broadly referred to as the conflict of interest issue. Despite the district court's specific requests for information—and DOJ's assurances that such information was forthcoming—DOJ's memorandum was completely devoid of relevant material. Without the promised information, Petitioner was unable to draft a narrowly-defined discovery request—a fact that she pointed out in her response memorandum.

On November 22, 2000, the district court ordered Petitioner to file a copy of the sworn declaration in which one defendant admitted giving another defendant compensatory time to which he was not entitled. Petitioner submitted the declaration as well as her disclosure statement explaining why the defendants' conduct was unlawful.

The district court issued a Memorandum Opinion and Order both filed December 6, 2000, addressing Petitioner's motion to disqualify DOJ and her petition for an evidentiary hearing. The motion to disqualify DOJ was denied. The petition for an evidentiary hearing was granted because Petitioner had presented a colorable claim that DOJ did not fully investigate the allegations set forth in her amended Complaint.

The district court ruled that Petitioner and DOJ would be permitted to present evidence on whether it was premature for DOJ to seek dismissal, and evidence pertinent to the dollar

amount of the potential monetary recovery. Petitioner and DOJ would also be permitted to present evidence addressing the factors for dismissal set forth in *United States ex. rel Sequoia Orange Co. v. Baird-Neece Packaging Corp.*, 151 F.3d 1139 (9th Cir. 1998), *i.e.*, whether dismissal serves a valid governmental purpose, whether there is a rational relationship between that valid governmental purpose and dismissal, and whether DOJ's decision to seek dismissal is fraudulent, arbitrary and capricious, or illegal. The district court denied discovery prior to the evidentiary hearing – even though DOJ had sole possession of all evidence pertinent to the *Sequoia* factors *i.e.*, information concerning its decision-making process. And it was silent regarding DOJ's conspicuous failure to provide any of the requested information.

Petitioner moved to dismiss Defendant Flanigan in light of his having been recently appointed Principal Deputy White House Counsel, and to drop her personal retaliation claim to avoid confusion. Orders were entered granting both.

Petitioner then moved to unseal the case so that she could freely gather evidence from third parties about DOJ's decision-making processes prior to the evidentiary hearing. She also renewed her request for discovery or information from DOJ about its decision-making processes. Both motions were denied in a Memorandum Opinion and Order entered July 6, 2001.

The evidentiary hearing was held on July 12, 2001 in a locked courtroom. Petitioner was the sole witness. At the conclusion of the hearing, the district court requested further briefing, which was completed on July 24, 2001. Six days later, on July 30, 2001, the district court filed a Memorandum Opinion and Order dismissing Petitioner's *qui tam* Complaint.

On August 29, 2001, Petitioner filed a notice of appeal. On September 20, 2001, DOJ entered a notice of appearance on

behalf of "appellee" United States. On October 9, 2001, Petitioner filed a motion to strike the DOJ attorney's appearance on the grounds that—having successfully sought and obtained an adjudication below that it was not a party—the United States cannot be heard as a party on appeal. The DOJ attorney filed an opposition. The court of appeals issues a *per curium* order, stating that the issue would be addressed in the main briefs and referred to the merits panel. The *per curium* order also granted Petitioner's motion to unseal the case.

Opinion of the Court of Appeals

The court of appeals opinion affirming the district court first held that the statute did not require DOJ to intervene prior to moving to dismiss. The court's strained interpretation of §§ 3730(c)(1) and (c)(2) also concluded that if its interpretation was wrong, then it would consider a motion to dismiss as including a decision to intervene.

The court then stated that it was not sure that the *Sequoia* standard applied to the dismissal, but that in any event the government met the *Sequoia* standards for dismissal. It stated that Petitioner failed to establish that the government's prosecutorial judgment was arbitrary and capricious, illegal, or fraudulent. The court explained that dismissal is proper because "a relator's standing derives from the injury to the United States and a partial assignment of the government's claim for damages. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 773-74, 120 S. Ct. 1858, 1862-63, 146 L. Ed. 2d 836 (2000). Dismissal ends the assignment."

Finally, the court held that DOJ need not investigate when it conceded the truth of the allegations in the complaint, and that she was not entitled to discovery of DOJ because she had not made a threshold showing that the government acted improperly. The court did not even address the merits of

Petitioner's evidence in this regard. The court also held it was not error to keep the case under seal.

The opinion did not address the issue of the status of the United States in the court of appeals.

Petitioner invoked jurisdiction in the district court pursuant to 28 U.S.C. §§ 1345 and 31 U.S.C. §§ 3730(e)(4) and 3732(a). The court of appeals had jurisdiction under 28 U.S.C. §§ 1291, 1294.

REASONS FOR GRANTING PETITION

I. REVIEW IS WARRANTED BECAUSE THE *QUI TAM* PROVISION OF THE FALSE CLAIMS ACT IS OF GREAT IMPORTANCE TO THE AMERICAN TAXPAYER, AND REVIEW BY THIS COURT IS ESSENTIAL TO CLARIFY THE ROLES OF THE RELATOR AND THE DOJ.

In her Complaint, Petitioner alleged that then current and former DOJ-OLC managerial employees defrauded the United States in violation of the FCA by participating in a scheme to falsify time sheets and leave slips. Factually, the case is extremely straight-forward, as one of the defendants admitted in a signed declaration submitted in another legal proceeding that she had given comp-time to an ineligible SES employee. Petitioner likely would prevail on liability in a summary judgment motion. Damages depended upon whether the DOJ investigation revealed that comp-time fraud was broader or more wide-spread.

Instead, DOJ ensured that the scope of the payroll fraud would never be known by abdicating its express statutory mandate to diligently investigate. Worse yet, DOJ skipped the statutorily-required intervention decision that would lead to the case being unsealed and exposed to public scrutiny. Instead, DOJ moved to dismiss prior to either investigating or

choosing to intervene—a procedure that is contrary to the plain language of the statute.

To be sure, DOJ has an interest in the wise allocation of investigative resources. As litigator-in-chief for the government, DOJ also has an interest in preserving its prosecutorial discretion to decide which cases to prosecute. More importantly, however, the United States Treasury has an interest in protecting the public fisc and bolstering taxpayer confidence by recouping losses suffered through fraud, and in deterring fraud in the first instance. Those interests are not served when DOJ wields its dismissal power in a selective, arbitrary, and capricious manner that affords protection to DOJ managers, and penalizes honest DOJ staff attorneys.

A. DOJ's Mandated Investigation is Central to the Working of the FCA.

While DOJ has some discretion with respect to enforcement of the FCA, there is one area in which it has no discretion whatsoever. Section 3730(a) provides that "[t]he Attorney General *diligently shall investigate* a violation under section 3729 [the prohibition against submitting or conspiring to submit false claims]." To ignore the plain meaning of this provision is to seriously undercut one of the FCA's primary goals: to provide an incentive for employees with knowledge of fraud to come forward by ensuring that reported fraud will be investigated.

As this Court has noted, "shall" generally denotes a mandatory duty: "The word 'shall' is ordinarily 'the language of command.'" *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). At least one court has indicated that the FCA does impose on DOJ a statutory duty to investigate. *See Matter of Doe*, 801 F. Supp. 478, 491 (D.N.M. 1992) ("The Department also has the statutory duty to investigate violations of certain

civil statutes . . . . [T]he False Claims Act . . . provides that the Attorney General 'diligently shall investigate'".)

DOJ cannot point to any case suggesting that section 3730(a)'s plain language gives it discretion to decline investigation. In fact, DOJ's action here is contrary to its past acknowledgment of its mandatory duty. *See United States v. Teeven*, 1990 WL 599373, *3 (D. Del. Sept. 28, 1990) (DOJ argued that § 3730(a) "not only authorizes but actually obligates the Government to conduct thorough and diligent investigations of false claims").

This plain meaning interpretation is consistent with Congress' purpose, as evidenced in the FCA's legislative history. Under section 3730(c)(2)(A), for example, a relator is entitled to an evidentiary hearing on DOJ's motion to dismiss if she "presents a colorable claim that . . . *the Government has not fully investigated the allegations*." S. Rep. 99-345, *reprinted in* 1986 U.S.C.C.A.N. at 5291. Moreover, the purpose of the initial 60-day seal period is to "allow the Government an adequate opportunity to *fully evaluate* the private enforcement suit," *id.* at 5289 (emphasis added), and "to *study and evaluate*" the information provided by a relator, *id.* (emphasis added). As noted in *United States ex rel. Green v. Northrop Corp.* 59 F.3d 953, 966 (9th Cir. 1995), "[b]oth the structure of the Act and the legislative history reveal that . . . Congress sought to encourage [the filing of private suits] . . . *to spur the government to undertake its own investigations*" (emphasis added).

The record confirms that DOJ failed to undertake *any* kind of investigation in this case—much less a diligent one. By its own admission, DOJ merely calculated the cost to the government of a three-week leave for an official in Cox's position. Indeed, Petitioner's offer to assist in the investigation by making herself available for questioning was declined by the DOJ attorney representing the United States. The motion to dismiss deprived Petitioner of an opportunity to

speak with DOJ about its investigation and to provide input thereon, based on her personal knowledge, prior to DOJ's decision to move for dismissal.

In the absence of the mandatory diligent investigation, DOJ cannot "fully evaluate" this or any other relator's allegations, the pervasiveness of the fraud, or damages and penalties. Under these circumstances, dismissal was extremely premature. DOJ's motion to dismiss should have been denied as premature and "illegal." *See Sequoia,* 151 F.3d at 1142. Given the importance of the mandated investigation to the FCA, the petition should be granted.

B. Allowing DOJ to Dismiss a Meritorious *Qui Tam* Action When the United State Has Not Intervened as a Party is Contrary to the Statute and Federal Procedure.

The FCA is clear on its face, and in its structure, that DOJ cannot move to dismiss an otherwise meritorious complaint without first intervening in the action. Here, DOJ pointedly did not intervene, so that it could assert non-party status and better avoid discovery on the processes underlying its decision to move for dismissal. DOJ's motion to dismiss should have been summarily denied on the grounds that, as a non-party, the United States had no standing to move for dismissal on nonjurisdictional grounds.

While the United States has an interest in the outcome of the *qui tam* case, it is not a party to the litigation unless it intervenes, and it cannot move for dismissal unless it is a party. The FCA's words and structure clearly require this interpretation. DOJ has itself interpreted the FCA to require intervention prior to moving for dismissal—except in this lawsuit. Judicial opinions closely examining the issue have also required this. As discussed in Part II *infra,* this decision thus creates a split in the circuits on the issue.

Read as a whole, section 3730 makes clear that DOJ's authority to move for dismissal is *expressly* conditioned on its first notifying the district court of its intervention decision. Subsection (a) sets forth the "[r]esponsibilities of the Attorney General," and provides that the Attorney General may bring an action if he finds a violation of § 3729. Subsection (b) sets forth the procedures for "[a]ctions by private persons" (*i.e.*, relators), from the time of filing the complaint up to and including the intervention decision by DOJ, the unsealing of the complaint, and its service on the defendants. Under subsection (b)(4), DOJ must either intervene (thereby becoming a party) and proceed with the litigation, or notify the court that it declines to intervene, in which case the relator conducts the action. § 3730(b)(4). These are the only two options available to the Government. *See United States ex rel. Neher v. NEC Corp.*, No. 92-2854, *slip op.* at 23 (11th Cir. April 28, 1995).

Subsection (c) of § 3730 then sets forth the "[r]ights of the *parties* to qui tam actions" (emphasis added). Only "if the Government proceeds with the action" does it have primary responsibility for the action, unbound by the relator's actions. § 3730(c)(1). The relator nevertheless remains "a party to the action, subject to the limitations set forth in paragraph (2)." *Id.* Paragraph (2) limits the relator by authorizing the Government: to move for dismissal after notice and an opportunity for a hearing, § 3730(c)(2)(A); to settle the action with the defendant subject to stated limitations, § 3730(c)(2)(B); and to limit the relator's participation if it shows that such limitations are justified, §-3730(c)(2)(C) & (D). Thus, the provisions of § 3730(c)(2), *including the Government's right to move for dismissal after notice and an opportunity for hearing,* are expressly reserved for those circumstances in which the Government has intervened and become a party.

DOJ has itself interpreted the FCA's *qui tam* provision as requiring intervention prior to moving for dismissal. In its 1988 Civil Fraud Monograph, DOJ states that "*[i]f* the Government elects to intervene . . . [t]he Government may *then* dismiss the action even over the objection of the relator, as long as the Government has previously notified the relator . . . ." 3 Aspen's DOJ Manual 4-4.700A (1994 Supp.) (emphasis added). DOJ thus also understands the plain meaning of §§ 3730(b)(4) and 3730(c)(2)(A). DOJ's blatant violation of the procedural requirements of the *qui tam* statute here strongly supports this Court accepting the petition for certiorari.

Finally, Petitioner's reading of the FCA is fully consistent with standard litigation procedure set forth in the Federal Rules of Civil Procedure. The Federal Rules clearly contemplate that a motion to dismiss is a motion made by a "party" to the proceeding. *See, e.g.*, Fed R. Civ. P. 11(a) (every written motion must be signed by an attorney or, if a "party" is unrepresented, by the party); Fed R. Civ. P. 12 (describing motions by defendants and "parties").

Here, the courts below allowed DOJ to have the best of both worlds—the right to fully participate as if it was a party, without the responsibility of submitting to discovery. The Court should take this opportunity to correct this fundamental misinterpretation of the statute, and of the normal operation of federal procedure.

II. THE DECISION BELOW CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEALS

The decision to allow DOJ to participate in a *qui tam* case without becoming a party by intervening conflicts with the decision in the Eleventh Circuit in *Neher*, slip op. at 6-7. Contrary to the direct holding here, that court held that DOJ must be a party before moving to intervene. Where the

government moved for dismissal of *qui tam* action and won in the district court, the government's "interest in this litigation and its active participation in the case to protect that interest have been sufficient to make it a 'party' below for purposes of determining the appeal period." *Id. Neher* also held:

> The government now seeks to take advantage of its blatant violations of the [False Claims Act provisions] by arguing that the district court did not have jurisdiction to award Williams a portion of the settlement proceeds because the government is not a "party" to this action. This argument is specious. The government cannot, as it has in this case, actively participate in the case but retain the status of "amicus curiae."

Id. at 28-29.[2] Other courts are in accord with the holding in *Neher*. "[T]he Government can compel dismissal or settlement of a *qui tam* action *if it formally intervenes* . . . ." *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 738 (3d Cir. 1997) (*citing* 31 U.S.C. § 3730(c)). *See also United States ex rel. Ridenour v. Kaiser-Hill Co.*, Civ. No. 97-WM-2191, slip op. at 5 (D. Colo. Jan. 17, 2001) ("It is only appropriate administratively that a person moving to dismiss a case actually be before the court as a party.")

A few cases in dicta have indirectly supported the proposition that DOJ can move to dismiss prior to intervening. *See Juliano v. Federal Asset Disposition Authority*, 736 F. Supp. 348, 351 (D.D.C. 1990), *aff'd on other grounds in unpublished op.*, 959 F.2d 1101 (D.C. Cir. 1992). And in *Sequoia*, the court in dicta cited the district court in *Juliano* in support of the proposition that the government can move to dismiss after declining to intervene, or after subsequently

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[2] The Eleventh Circuit Rule of Appellate Procedure 36.2 states that unpublished opinions of the court are not "binding precedent," but "may be cited as persuasive authority."

intervening for good cause under section 3730(c)(3). 153 F.3d at 1145. These cases can be distinguished on several bases, and, most importantly, both acknowledged that their conclusions were in tension with the words of the statute.

This issue is sufficiently central to the enforcement mechanism of the FCA that this Court should resolve the conflict among the circuits.

III. THE DISTRICT COURT'S PROCEDURAL RULINGS CONCERNING THE EVIDENTIARY HEARING ON DOJ'S MOTION TO DISMISS THE *QUI TAM* COMPLAINT DENIED PETITIONER A FAIR HEARING.

The district court made several erroneous procedural rulings that effectively denied Petitioner a meaningful opportunity to show the fraudulent, arbitrary and capricious, and illegal nature of DOJ's motion to dismiss.

First, the district court denied Petitioner a meaningful opportunity for discovery against DOJ. Because the evidence necessary to satisfy the *Sequoia* test was almost entirely in the possession of DOJ, this denial of discovery made it impossible for Petitioner to have a meaningful evidentiary hearing. Petitioner's task was to demonstrate that DOJ's decision to move for dismissal was fraudulent, arbitrary and capricious, or illegal. To meet this standard, she needed to show that DOJ was motivated by animus arising from her prior employment litigation against it.

By moving to dismiss, DOJ necessarily opened its underlying decision-making process to some judicial scrutiny—including scrutiny of DOJ's normal practices and policies. Alternatively, given that the information is exclusively within DOJ's control, Petitioner was entitled to a presumption that DOJ's failure to produce such information established that (1) DOJ does not, as a matter of policy, move to dismiss

meritorious *qui tam* cases without first intervening; and (2) DOJ does not, as a matter of policy, move to dismiss *qui tam* cases simply because "single damages" are *de minimis* (although it may decline to intervene for that reason). Thus, in the absence of additional evidence, DOJ failed to meet its burden of showing that dismissal is rationally related to a legitimate governmental interest.

United States v. Microsoft Corp., 253 F.3d 34, 101 (D.C. Cir. 2001) (en banc), bolsters the Petitioner's argument that fundamental principles of fairness require limited discovery here:

> It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings. Any other course would be contrary "to the spirit which imbues our judicial tribunals prohibiting decision without hearing." *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947).

Second, because this *qui tam* case was under seal, Petitioner was chilled in her ability to obtain from non-DOJ sources evidence in support of her claim that DOJ's decision to seek dismissal was fraudulent, arbitrary and capricious, and illegal under *Sequoia*. The purpose of the seal is to afford DOJ an opportunity to diligently investigate Petitioner's allegations, to evaluate the case, and to decide whether to intervene on behalf of the United States, without prematurely alerting the defendants to the existence of the *qui tam* action. *See* S. Rep. No. 99-345, at 24-25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-90. None of those purposes was being served when Petitioner moved to unseal this case in June of 2001. The case had been sealed for over two years, and DOJ had steadfastly maintained that it would not investigate.

Petitioner therefore moved to unseal the case so that she could talk freely to third parties for purposes of gathering

evidence for the evidentiary hearing. The district court's denial of Petitioner's motion to unseal deprived her of a fair and meaningful evidentiary hearing.

A review of the record discloses that at the time Petitioner filed her motion—and at all times thereafter—there was no "good cause" to maintain the seal. The *qui tam* seal requirement is a limited exception to the long-recognized common law right of public access to judicial records filed in court. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") (footnotes omitted). For these reasons, Congress required that extensions of the sixty-day seal period in *qui tam* cases be based on "good cause shown." *See* 31 U.S.C. § 3730(b)(3).

The legislative history of the FCA clearly shows that Congress viewed the "good cause" requirement as a substantive one that is not lightly established. For example, a prosecutor's workload and even the existence of a criminal investigation are not sufficient justifications for extending the seal. *See* S. Rep. No. 99-345, at 24-25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-90. In *United States ex rel. Costa v. Baker & Taylor*, 955 F. Supp. 1188 (N.D. Cal. 1997), the court granted the relator's application to lift the seal over the government's objection rejecting DOJ's assertion that eighteen months was insufficient time in which to determine whether to intervene. Nor was the court persuaded that the seal was justified by an ongoing criminal investigation. *Id.* at 1190. In light of the strong public interest in monitoring governmental activities, the court also rejected DOJ's suggestion that the case should remain sealed for purposes of enhancing settlement discussions. *Id.* at 1191.

By comparison, the instant case had been under seal for more than 28 months when Petitioner moved to unseal.

There was no criminal or civil investigation underway or contemplated, and DOJ had no intention of pursuing the defendants—much less settling with them.

The district court's denial of Petitioner's motion to unseal was prejudicial because, as discussed above, Petitioner was denied discovery from DOJ, and her only other avenue was to locate and contact other relators who would have information about DOJ's *qui tam practices.* The seal prevented her from doing this.

Third, Petitioner was denied the opportunity to support her case with two DOJ monographs. Petitioner had argued that a 1982 DOJ memorandum introduced by DOJ to the district court was supplanted by *qui tam* dismissal procedures and standards set forth in the 1988 and 1994 Civil Fraud Monographs prepared by DOJ-CLB.

DOJ represented to the Court that the 1988 and 1994 monographs are privileged documents and that, to the best of DOJ counsel's recollection, they did not address DOJ's procedures and standards for moving to dismiss a meritorious *qui tam* action. DOJ never mentioned that in 1994, Aspen Publishers, Inc., published the 1988 Civil Fraud Monograph in its entirety as a supplement to Aspen's five-volume treatise entitled *The Department of Justice Manual* ("Aspen's DOJ Manual"). Only after the evidentiary hearing did Petitioner learn of the published Monograph and that copies of this multi-volume loose-leaf treatise, including the 1988 Civil Fraud Monograph, were currently available in public libraries, including the Library of Congress. *See* 3 Aspen's DOJ Manual 4-4.700A (1994 Supp).

With regard to the 1994 Civil Fraud Monograph, DOJ's selective disclosure of the 1982 Memorandum on the issue of whether and when DOJ would seek dismissal of *qui tam* cases clearly caused any portions of the 1994 Civil Fraud Monograph dealing with those issues to lose any privilege

that otherwise would have attached, particularly portions dealing with policies on seeking dismissal because of the alleged *de minimis* nature of a case. Yet the district court did not examine the 1994 Monograph.

The monographs support the Petitioner's argument that DOJ has never before sought to dismiss an otherwise meritorious *qui tam* claim simply because "single damages" are *de minimis*. In short, the alleged *de minimis* standard is pure pretext, but the combined effect of the district court's procedural rulings unfairly limited Petitioner's ability to show it.

Together, the above procedural rulings removed any meaningful opportunity Petitioner had to further show the fraudulent, arbitrary and capricious nature of DOJ's motion to dismiss.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 12, 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5312

SUSAN J. SWIFT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Argued December 5, 2002
Decided February 11, 2003

Before: EDWARDS, HENDERSON, and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: On January 19, 1999, Susan Swift, a Department of Justice attorney employee, brought a *qui tam* action against one employee and two former employees of the Justice Department's Office of Legal Counsel, claiming that in 1992 and thereafter they had conspired to defraud the government, in violation of the False Claims Act, 31 U.S.C. §§ 3729(a)(3). For reasons unnecessary to recount, one of the defendants was dropped from the case. Swift alleged that the remaining two defendants had also violated 31 U.S.C. §§ 3729(a)(1) and (2) by presenting a false claim to the government. The alleged fraud, which dealt with time sheets and leave slips, amounted to $6169.20.

On April 2, 1999, without purporting to intervene, the government moved to dismiss the complaint, arguing that the amount of money involved did not justify the expense of

litigation even if the allegations could be proven. Swift opposed dismissal and requested a hearing. She also sought leave to engage in discovery in order to learn the Justice Department's policy about dismissal of *qui tam* actions, and she moved to unseal the record, arguing that this would facilitate her efforts to gather information about the policy. The district court ordered a hearing, but denied Swift's motions for discovery and unsealing. After several delays and the hearing, the court dismissed the complaint, holding that the government had demonstrated that dismissal was rationally related to a valid governmental purpose. As a result, the complaint was never served on the defendants.

Swift's appeal is on the grounds that the government cannot move to dismiss without first intervening, that the government did not justify its decision to dismiss, that dismissal was improper since the government did not investigate her claims, and that the district court erred in denying her discovery and in refusing to unseal the record.

The section of the False Claims Act dealing with the government's dismissal of *qui tam* actions provides: "The Government may dismiss [a *qui tam*] action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. §§ 3730(c)(2)(A). As is evident from the quotation, the provision does not say that the government must intervene in order to seek dismissal. Swift concedes as much, but maintains that intervention is required in light of §§ 3730(b) and §§ 3730(c)(1).

Section 3730(b)(2) gives the government sixty days, plus any court-ordered extensions, "to elect to intervene and proceed with the action" after receiving the complaint and being informed of the material evidence. At the end of the sixty-day period (unless extended), the government "shall proceed with the action . . . or notify the court that it declines to

take over the action." 31 U.S.C. §§ 3730(b)(4). Swift views §§ 3730(b)(4) as giving the government but two options: intervene or do not intervene. This is correct, but she misses the point that §§ 3730(b)(2) makes intervention necessary only if the government wishes to "proceed with the action." Ending the case by dismissing it is not proceeding with the action; to "proceed with the action" means, in the False Claims Act, that the case will go forward with the government running the litigation. *Cf. Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 118, 88 S. Ct. 733, 742, 19 L. Ed. 2d 936 (1968).

The other provision Swift cites, §§ 3730(c)(1), reads: "If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the [relator]. [The relator] shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)." Swift's position is that the phrase "subject to the limitations set forth in paragraph (2)" means that the government's dismissal power under §§ 3730(c)(2) exists only within the context of §§ 3730(c)(1). So viewed, the government could not move to dismiss unless it had complied with §§ 3730(c)(1) by intervening and proceeding with the action.

Her interpretation is unwarranted. The phrase "subject to the limitations set forth in paragraph (2)" can signify only that the relator's right to remain a party after the government has intervened is constrained by the government's right to dismiss the action pursuant to §§ 3730(c)(2). Swift's interpretation requires one to read "subject to" as also having the converse meaning—that §§ 3730(c)(1) acts as a limit on the operation of §§ 3730(c)(2). Nothing in §§ 3730(c)(1) justifies that reading. To support Swift's interpretation, either §§ 3730(c)(2) would have to be a subsection of §§ 3730(c)(1)—which it is not—or §§ 3730(c)(2) would have to contain language stating that it is applicable only in the context of

§§ 3730(c)(1)—which it does not (as highlighted by the fact that §§ 3730(c)(2) contains two express constraints on the government's ability to dismiss, neither of which is related to §§ 3730(c)(1)). In other words, the second sentence of §§ 3730(c)(1) is limited by §§ 3730(c)(2), but §§ 3730(c)(2) is independent of §§ 3730(c)(1). In any event, the question whether the False Claims Act requires the government to intervene before dismissing an action is largely academic. As Swift conceded at oral argument, if there were such a requirement, we could construe the government's motion to dismiss as including a motion to intervene, a motion the district court granted by ordering dismissal. *See United States ex rel. Neher v. NEC Corp.,* No. 92-2854, slip op. at 30 (11th Cir. Apr. 28, 1995).

Swift has a separate reason why the district court improperly dismissed the case. The district court applied the standard stated in *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.,* 912 F. Supp. 1325, 1339 (E.D. Cal. 1995), *aff'd sub nom. United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139 (9th Cir. 1998). Under that standard, the government may dismiss a *qui tam* case over the relator's objection if (1) the government shows that the dismissal is rationally related to a valid purpose, and (2) once the government satisfies this burden, the relator fails to show that the decision to dismiss was fraudulent, illegal, or arbitrary and capricious. *Sequoia,* 151 F.3d at 1145.

We hesitate to adopt the *Sequoia* test. It may be that despite separation of powers, there could be judicial review of the government's decision that an action brought in its name should be dismissed. *Cf. United States v. Cowan,* 524 F.2d 504, 513 (5th Cir. 1975). But we cannot see how §§ 3730(c)(2)(A) gives the judiciary general oversight of the Executive's judgment in this regard. The section states that "The Government"—meaning the Executive Branch, not the

Judicial—"may dismiss the action," which at least suggests the absence of judicial constraint. To this must be added the presumption that decisions not to prosecute, which is what the government's judgment in this case amounts to, are unreviewable. *Cf. Heckler v. Chaney,* 470 U.S. 821, 831-33, 105 S. Ct. 1649, 1655-57, 84 L. Ed. 2d 714 (1985); *Newman v. United States,* 382 F.2d 479, 480 (D.C. Cir. 1967). Reading §§ 3730(c)(2)(A) to give the government an unfettered right to dismiss an action is also consistent with the Federal Rules of Civil Procedure. Rule 41(a)(1)(i) permits a plaintiff to dismiss a civil action "without order of the court" if the adverse party has not yet filed an answer or a motion for summary judgment. A dismissal pursuant to Rule 41(a)(1)(i) is not subject to judicial review. *See Randall v. Merrill Lynch,* 820 F.2d 1317, 1320 (D.C. Cir. 1987). In *qui tam* actions, the complaint remains under seal for "at least" sixty days; government dismissal within that period necessarily occurs before the defendant has answered. (If the government tried to have an action dismissed after the complaint had been served and the defendant answered, it might be subject to Rule 41(a)(2), which requires an order of the court "upon such terms and conditions as the court deems proper.")

The relator's right to a hearing, as set forth in §§ 3730(c)(2)(A), is all that points to a role for the courts in deciding whether the case must go forward despite the government's decision to end it. The *Sequoia* court viewed this provision as authorizing judicial review of the government's reasons for dismissal, 912 F. Supp. at 1338, explaining that this would not "place an additional burden on the executive's exercise of prosecutorial discretion, because the constitution itself prohibits arbitrary or irrational prosecutorial decisions." *Id.* at 1340. This is not an accurate statement of constitutional law with respect to the government's judgment not to prosecute. The Constitution entrusts the Executive with duty to "take Care that the Laws be faithfully executed." U.S. CONST., art. II, §§ 3. The decision whether

to bring an action on behalf of the United States is therefore "a decision generally committed to [the government's] absolute discretion" for the reasons spelled out in *Heckler v. Chaney,* 470 U.S. at 831, 105 S. Ct. at 1655. The government's discretion to dismiss an action it has already brought may not be absolute, but even then courts presume the Executive is acting rationally and in good faith. *See, e.g., Rinaldi v. United States,* 434 U.S. 22, 30, 98 S. Ct. 81, 85-86, 54 L. Ed. 2d 207 (1977); *see also United States v. Armstrong,* 517 U.S. 456, 464-65, 116 S. Ct. 1480, 1486- 87, 134 L. Ed. 2d 687 (1996). Nothing in §§ 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States. The provision neither sets "substantive priorities" nor circumscribes the government's "power to discriminate among issues or cases it will pursue." *Heckler v. Chaney,* 470 U.S. at 833, 105 S. Ct. at 1656. We therefore conclude that the function of a hearing when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case. While the government conceded at oral argument that there may be an exception for "fraud on the court," no evidence of that sort was presented, and we therefore do not pass on whether this type of exception, or any other, might be consistent with our reading of §§ 3730(c)(2)(A).

The *Sequoia* court also justified its test on the basis of legislative history of the 1986 amendment to the False Claims Act. The Ninth Circuit quoted statements from a Senate committee report that a relator may object to a government motion to dismiss in order to prevent the government from "dropp [ing] . . . false claims cases without legitimate reasons" and may petition for an evidentiary hearing, which the court should grant "if the relator presents a colorable claim that the . . . dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on

arbitrary or improper considerations." S. Rep. No. 99-345, at 26 (1986). But this portion of the Senate report relates to an unenacted Senate version of the 1986 amendment. That version read: "If the Government proceeds with the action . . . the [relator] shall be permitted to file objections with the court and to petition for an evidentiary hearing to object to . . . any motion to dismiss filed by the Government." *Id.* at 42. The whole point here is that the government has not elected to proceed; it has elected to dismiss the case. Had the Senate version been enacted, the Senate report still would not support the Ninth Circuit's judgment.

Even if *Sequoia* set the proper standard, the government easily satisfied it. The asserted governmental interests were that the dollar recovery was not large enough to warrant expending resources monitoring the case, complying with discovery requests, and so forth, and that spending time and effort on this case would divert scarce resources from more significant cases. Although Swift believes that the costs would be relatively small, the government's goal of minimizing its expenses is still a legitimate objective, and dismissal of the suit furthered that objective. *See Heckler v. Chaney,* 470 U.S. at 831, 105 S. Ct. at 1655-56; *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group,* 468 U.S. 841, 859 n. 17, 104 S. Ct. 3348, 3358 n. 17, 82 L. Ed. 2d 632 (1984). In addition, Swift failed to establish that the government's prosecutorial judgment was arbitrary and capricious, illegal, or fraudulent. While she asserted that the government's reasons for dismissal were pretextual, she offered nothing to support the charge.*

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* The theory is that a relator's standing derives from the injury to the United States and a partial assignment of the government's claim for damages. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 773-74, 120 S. Ct. 1858, 1862-63, 146 L. Ed. 2d 836 (2000). Dismissal ends the assignment.

Few words are needed to dispose of Swift's remaining arguments. Since the government conceded the truth of Swift's allegations when it sought to dismiss, the fact that the government did not investigate the validity of her charges is of no consequence. As to her claim that she was entitled to discovery, the Supreme Court has stated that a party is not entitled to discovery of information relating to prosecutorial decisions absent a substantial threshold showing. *See Armstrong,* 517 U.S. at 463, 116 S. Ct. at 1485-86. As we have said, Swift offered no evidence to support her allegations that the government acted improperly. Nor did the district court abuse its discretion in denying Swift's motion to unseal the case. Swift did not oppose the government's motion to keep the case sealed during the proceedings on dismissal, and although she had many months to file a motion to unseal, her motion came at the eleventh-hour; granting it would have delayed the hearing, which had already been postponed twice at Swift's request. *Cf. Ned Chartering & Trading, Inc. v. Republic of Pakistan,* 294 F.3d 148, 151 (D.C. Cir. 2002).

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Jul. 30, 2001]

Civil Action No. 99-145 (CKK)
FILED UNDER SEAL

UNITED STATES OF AMERICA *ex rel.* SUSAN J. SWIFT,
Plaintiff,

v.

TIMOTHY E. FLANIGAN, *et at.,*
Defendants.

MEMORANDUM OPINION
(July 30, 2001)

This *qui tam* action, filed under the False Claims Act, 31 U.S.C. §§ 3729-3732 ("FCA"), comes before the Court on the Government's motion to dismiss. Conceding only for purposes of the motion that the Relator's allegations of fraud are accurate, the Government asserts that the amount of money at stake does not justify the expense that ongoing litigation would impose. Relator Susan Swift, by contrast, contends that the funds at stake are substantial and that the Government bears a statutory duty to investigate claims of fraud like hers in any case. Upon consideration of the Government's motion and all other pertinent briefing,[1] the Court shall grant the

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[1] In resolving the motion, the Court has assessed the following materials: Untied States' Motion to Dismiss the Complaint or, in the Alternative, Suggestion of Partial Dismissal with Respect to Defendants Flanigan and Cox; Relator's Opposition to the Government's Motion to Dismiss; United States' Reply Memorandum in Support of Motion to Dismiss; Supplemental Memorandum of United States in Support of

Government's motion and dismiss Swift's Amended Complaint with prejudice.

I. BACKGROUND

In the summer of 1992, while working in the Office of Legal Counsel (OLC) at the Department of Justice, Swift approached Defendant Kathleen Murphy to discuss the comp-time policy in effect in OLC. *See* Am. Compl. ¶¶ 14, 25. As Executive Officer of OLC, Murphy handled time sheets and leave slips for employees in the office. *See id.* ¶¶ 17, 23. According to Swift, Murphy told her that "she compensated [Defendant Cox] for the long hours he worked by not deducting annual leave from his annual leave account when he was out of the office on vacation." *Id.* ¶ 27. In particular, Murphy allegedly remarked that she had not deducted annual leave from Cox's account for a three-week vacation. *See id.* Swift maintains that this approach to compensation time ("comp-time") and annual leave violates OLC policy and thereby defrauds the Government. *See id.* ¶¶ 27, 54-57.

Acting on her belief that Cox had fraudulently received comp-time, Swift discussed her concerns with Timothy Flanigan, Assistant Attorney General for OLC, in December 1992. *See id.* ¶¶ 15, 31. Swift asserts that Flanigan "wasn't

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Motion to Dismiss; Relator's Response to the U.S. Department of Justice's Supplemental Memorandum on its Motion to Dismiss; Relator's Response Memorandum in Support of her Opposition to DOJ's Motion to Dismiss; Submission by the United States of District Judge Lamberth July 6, 2001, Memorandum and Order (filed July 13, 2001); Submission of United States Regarding Civil Fraud Monograph (filed on July 13, 2001); Supplemental Submission by United States (filed July 19, 2001); Relator's Memorandum on Potential Trial Proceeds (filed July 24, 2001); Relator's Memorandum Addressing New Evidence Pertinent to DOJ's Motion to Dismiss That Was Discovered After the Evidentiary Hearing (filed July 26, 2001). The Court has also considered the arguments presented at a Status Hearing on July 17, 2000, and the arguments and evidence presented at an Evidentiary Hearing on July 12, 2001.

troubled by what she had told him." *Id.* ¶ 31. According to Swift, after disclosing her concerns to Flanigan she was subjected to wide-ranging retaliation orchestrated by Flanigan, Cox, Murphy, and Walter Dellinger, who replaced Flanigan during the 1993 transition between presidential administrations. *See id.* ¶¶ 31-50. Swift avers that the defendants retaliated against her by discrediting her and attempting to oust her from her position. *See id.* She contends that she suffered severe emotional harm and, consequently, commenced several legal proceedings against the Department of Justice ("DOJ"). *See id.* According to Swift, the retaliation and resulting harms continued until January 1997, at which point she reached an agreement with DOJ settling the legal actions she had brought under the Whistleblower Protection Act, the Privacy Act, and gender harassment and discrimination laws. *See id.* ¶ 50.

On January 19, 1999, Swift filed the present *qui tam* lawsuit in which she alleges that the conduct surrounding Cox's accrual of annual leave defrauded the government in violation of the FCA. *See* Compl.[2] Swift's first two counts recite claims brought on behalf of the Government pursuant to the FCA. In the first count, she contends that Cox and Murphy prepared and submitted false claims relating to Cox's comp-time. *See* Am. Compl. ¶¶ 54-57. In the second count, she alleges that Cox, Murphy and Flanigan conspired to allow the submission of those false claims. *See id.* ¶¶ 58-61.[3]

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[2] Swift filed an amended complaint on May 3, 1999. It differs from the original only because it added Randolph Moss and the Department of Justice as defendants to her third count, in which she sought personal redress from the defendants under the False Claims Act's whistleblower provision. *See* Am. Compl. ¶¶ 62-67. Swift voluntarily dismissed the third count on June 1, 2001.

[3] Swift voluntarily dismissed Flanigan from Count II on June 18, 2001. This dismissal, taken in conjunction with her voluntary dismissal of Count III on June 1, 2001, effectively dismissed Flanigan from the suit altogether.

On April 2, 1999, before determining whether or not it would intervene in the action, the Government filed a motion to dismiss Swift's *qui tam* action, arguing that pursuing the matter would be contrary to the public interest. *See* Mem. of P. & A. in Supp. of United States' Mot. to Dismiss at 11-12 [hereinafter "U.S. Mot."]. Conceding *arguendo* that the alleged misconduct occurred, the Government calculates the cost of Cox's fraud at $6,169.20 and maintains any potential recovery is too insignificant to merit the expense of litigation. *See id.* at 11.[4] The Government reached this figure by multiplying Cox's hourly wage ($51.41) by the number of work hours covered by the alleged comp-time fraud (120). *See* U.S. Mot. at 11.

In her opposition to the Government's motion, Swift contended that the Court should deny the motion outright or at least conduct an evidentiary hearing prior to ruling on it. *See* Mem. of P. & A. in Supp. of (1) Relator's Opp'n to the Gov't's Mot. to Dismiss or Partially Dismiss the Compl. and

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[4] Alternatively, the Government argues that it is not in the public interest to revisit the same alleged conduct and retaliation that was the subject of the settled actions that Swift brought against DOJ. *See id.* at 12. The Government also seeks the dismissal of Cox alone on jurisdictional grounds. Because the Court credits the Government's argument that the potential recovery does not merit the cost of ongoing litigation, it does not consider these alternative arguments.

The Government also sought the dismissal of Flanigan for jurisdictional reasons, as well as the dismissal of Count III on the grounds that (1) the defendants are not subject to the whistleblower provisions of the FCA, (2) the earlier settlement agreement between DOJ and Swift bars further litigation of these matters, and (3) government employees like Swift are not entitled to the FCA's whistleblower protections. *See id.* at 13-17. Subsequent to the Government's submission of the motion, Swift voluntarily dismissed Count III and dismissed Flanigan as a defendant. *See* Notice of Voluntary Dismissal (filed June 1, 2001); Relator's Unopposed Application for Leave of Court for Voluntary Dismissal of Def. Flanigan from Count II of the First Am. Compl. (filed June 18, 2001). Accordingly, the Court need not address these aspects of the Government's motion.

(2) Relator's Alternative Pet. for an Evidentiary Hearing at 1, 8-17 [hereinafter "Relator's Opp'n Mem."]. In part, Swift argues that the Government has not "diligently . . . investigate[d]" her claims as the FCA requires, *see id.* at 8-10, and, in contravention of the Government's estimates, she asserts that "the amount of money at stake . . . would be *at least* $50,000." *Id.* at 11 (emphasis in original). In a supplemental submission, Swift again asked that the Court hold an evidentiary hearing, requested limited discovery in advance of the hearing, and indicated the types of documentary evidence and live testimony that she would offer. *See* Relator's Supplemental Mem. in Supp. (filed June 12, 2000) at 6, 9-17 [hereinafter "Relator's June 12, 2000, Mem."]. In the same pleading, Swift argued that DOJ's posture in the matter, and its decision to seek dismissal, posed a conflict of interest sufficient to bar its further participation. *See id.* at 4-6.

After assessing the parties' submissions, the Court held a status hearing on the record on July 17, 2000, during which it indicated that it would not allow the hearing, or any discovery in advance of the hearing, to delve into matters outside the scope of the amended complaint. *See* July 17, 2000, Tr. at 6, 35. The Court also queried the parties in regard to the alleged conflict of interest and ordered them to file briefs on the issue. *See id* at 6-7, 34. After receiving and considering the supplemental briefing, the Court issued a Memorandum Opinion and Order on December 6, 2000, in which it concluded that DOJ's counsel of record was not precluded from proceeding for reasons of conflict. *See* Dec. 6, 2000, Mem. Op. at 6-12. The Court also considered the timing of the Government's motion and concluded that the Government is entitled to move for dismissal under the FCA even before it determines whether or not to intervene in the suit. *See id.* at 10-11. Finally, the Court determined that Swift was entitled

to an evidentiary hearing on the Government's motion, but concluded that she was not entitled to discovery of the type she requested. *See id.* at 12-15.[5]

After the scheduled hearing date was postponed several times at the parties' request, and after the Court considered and denied Swift's motion to unseal the proceedings and her repeated requests for discovery, *see* July 6, 2001, Mem. Op. & Order, the evidentiary hearing was convened on July 12, 2001.[6] Because the litigants' prior estimates of the Government's potential recovery had varied so widely, *see* U.S. Mot. at 11 ($6,169.24); Relator's Opp'n Mem. at 11 ("at least $50,000"), the Court directed Swift and the Government to focus their presentations and argument on the disputed issue of recoverable damages.

In her testimony at the hearing, Swift recounted her factual allegations and dramatically increased her damages estimate,

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[5] The Court convened the hearing after considering the Ninth Circuit's decision in *United States ex. rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir.1998). Relying on the legislative history of the FCA, the *Sequoia Orange* court held that a hearing on the Government's motion to dismiss "is appropriate 'if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations.'" *Id.* at 1145 (quoting S. Rep. No. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291).

[6] In advance of the hearing, Swift voluntarily withdrew Count III of her Amended Complaint, which contained her whistleblower claims. *See* Notice of Voluntary Dismissal (filed June 1, 2001). She also voluntarily dismissed Defendant Timothy Flanigan from the suit. *See* Relator's Unopposed Application for Leave of Court for Voluntary Dismissal of Def. Flanigan from Count II of the First Am. Compl. (filed June 18, 2001). Thus, at this point, the suit consists of only two counts and two defendants. In Count I, Swift alleges that Defendants Cox and Murphy defrauded the Government by providing Cox with three weeks of comp-time to cover a vacation. In Count II, she alleges that Cox and Murphy conspired to allow the false claims for vacation time to be submitted.

stating that the Government stands to recover some $98,000 in this action.[7] In reaction to Swift's revised recovery estimation, the Court ordered her to submit additional briefing explaining the recalculation.[8] In that additional briefing, Swift accepts the Government's estimation of the scope of the fraud, asserts that the damages should be trebled under the FCA, and argues that the Court should impose eight separate civil penalties of $10,000 apiece. *See* Relator's Mem. on Potential Litigation Proceeds at 3.

Having conceded *arguendo* that the fraud occurred and having agreed not to call witnesses of its own, the Government's presentation at the hearing was limited to a brief cross examination of Swift and the presentation of three exhibits.[9] Swift objected to the last of the three exhibits—the declaration of a DOJ paralegal named Debbie Smith—because of the contents of one of the attachments to the declaration. Specifically, Swift objected to the attached inter-

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[7] In addition to her testimony, Swift presented six exhibits during the evidentiary hearing. Two of the exhibits are copies of pleadings previously filed in this suit, three others are excerpted portions of the United States Attorneys' Manual, and the sixth is a May 6, 1998, memorandum from the Attorney General announcing DOJ's "Fraud Prevention Initiative." The Court admitted each of the six exhibits.

[8] In a curious demonstration of attorney/client miscommunication, Swift ultimately submitted two such briefs, one that she authored herself in *a pro se* capacity and a second, authored by her attorney, that seeks to replace the first. While they impart essentially identical information, the Court grants Swift's request and considers only the submission prepared by her attorney. *See* Relator's Mot. to File Out of Time & to Substitute Pleading; Relator's Mem. on Potential Litigation Proceeds.

[9] The Government presented a declaration establishing Cox's hourly wage, a declaration of Murphy that had been prepared for a separate, earlier proceeding, and the declaration of Debbie Smith, a DOJ paralegal. The Court admitted the first two exhibits at the hearing and reserved its ruling with respect to the third. As explained in the text, the third exhibit is hereby admitted as well.

nal DOJ memorandum on "Screening Civil Fraud Matters," which was published in 1982. *See* Smith Decl. Ex. 2. Paragraph B(9) of the memorandum states that "[t]here is no hard rule as to what constitutes de minimis fraud upon the Government[, but that] a fraud involving less then [sic] $3,000 to $3,500 is probably de minimis, for our purposes." *Id.*, Ex. 2 at ¶ B(9). Swift objected to the document on the ground that it is irrelevant, as it has been superseded by subsequent editions of a privileged DOJ publication known as the "Civil Fraud Monograph". Additionally, Swift asked that the Court require the Government to release the latest edition of the monograph to the extent that it supersedes the pertinent information on de minimis standards articulated in the 1982 memorandum.

To resolve the matter, the Court directed the Government to file a submission indicating whether or not recent editions of the monograph contain descriptions of the Government's policy with regard to FCA suits that offer de minimis damages. In light of the Government's disclosure of the 1982 memorandum, the Court reasoned that subsequent articulations of the same policy may be discoverable under the subject matter exception to any privilege arguments that the Government could raise. On July 13, 2001, the Government informed the Court that subsequently published editions of the Civil Fraud Monograph do not contain information on de minimis standards. *See* Submission of the United States Regarding Civil Fraud Monograph. Together with that submission, the Government provided the Court with copies of the monographs' tables of contents for *in camera* review. Because the monographs do not appear to contain comparable information on DOJ de minimis standards, the Court finds that the agency need not provide Swift with copies of the monographs and that the 1982 memorandum is admissible.[10]

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[10] In a pleading filed on July 26, 2001, Swift informs the Court that Aspen Publishers, Inc. published the 1988 Civil Fraud Monograph in

During the evidentiary hearing the Government also referenced another *qui tam* proceeding underway in federal district court in Colorado that, in the Government's estimation, may impact this Court's approach to the present dispute. This Court allowed the Government to file a supplemental submission containing information on the comparable litigation, and, on July 19, 2001, the Government filed its Supplemental Submission by the United States. While the supplemental submission does not provide the Court with additional authority pertinent to the present analysis, two aspects of the Colorado action merit mention. First, in her recommendation on a motion to dismiss, the magistrate judge to whom the case had been referred concluded that the Government may seek dismissal even when it has not intervened in the action. *See* Suppl. Submission by the United States, Ex. 1 (*United States ex rel. Ridenour v. Kaiser-Hill Co.*, No. 97-WM-2191 (D.Col. Nov. 26, 2000) (Magistrate Judge Recommendation). Second, the district court, like this Court, concluded that the standard articulated in *Sequoia Orange* applies to motions to dismiss filed by the

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1994 as part of treatise called "The Department of Justice Manual." *See* Relator's Mem. Addressing New Evidence Pertinent to DOJ's Mot. to Dismiss at 1-3. Swift argues that any privilege that might otherwise attach to the Monograph has been waived by virtue of the publication. *See id.*

The Court notes that the pertinent question was not whether the monograph had been published, but rather whether it materially supercedes the portion of the 1982 memorandum that pertains to de minimis standards. *See* July 12, 2001, Order (requesting briefing on whether the monographs "materially supercede" the 1982 memorandum's treatment of de minimis standards). Swift's latest brief conspicuously omits any reference to a discussion of de minimis standards contained in the 1988 monograph. While she has photocopied select provisions of the monograph and provided them to the Court, she has neglected to indicate which portions, if any, bear on this topic. The Court has conducted its own review of the incomplete information that Swift has provided and finds that none of the photocopied pages materially supercedes the information on de minimis standards contained in the 1982 memorandum.

Government in qui tam actions. *See* Suppl. Submission by the United States, Ex. *2* (*United States ex rel. Ridenour v. Kaiser-Hill Co.*, No. 97-WM-2191 (D.Col. Jan. 17, 2001) (Order).

In the days since the evidentiary hearing, the Court has had occasion to consider the Government's motion to dismiss, Swift's opposition, and the Government's reply. The Court has also assessed the arguments and evidence presented during the hearing itself, the supplemental briefing filed since, and the entire pre-existing record in the case. After engaging in this thorough review, the Court concludes that the Government has demonstrated that dismissal is rationally related to a valid government purpose. Accordingly, the Court shall grant the motion and dismiss the case.

II. DISCUSSION

The FCA provides that "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). In considering the Government's motion to dismiss this *qui tam* action, the Court applies "[a] two step analysis." *United States ex. rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir.1998). First, the Court must determine whether the Government has "identifi[ed] . . . a valid government purpose." *Id* Second, the Court must assess whether the Government has demonstrated "a rational relation between dismissal and accomplishment of the purpose." *Id.* If the Government satisfies its burdens under the two step test, the burden switches to the relator to demonstrate that the decision to seek dismissal is fraudulent, arbitrary and capricious, or illegal. *See id.* Notably, however, the Government may move to dismiss even "a meritorious *qui tam* action over a relator's

objections . . . [w]here, as here, the government offers reasons for dismissal that are rationally related to a legitimate government interest." *Id.* at 1147.

Before considering the Government's motion under this two part inquiry, the Court first directs its attention to the disputed value of Swift's claims. As noted, conceding for the present purposes that the fraud occurred, the Government originally determined that its "damages would be approximately $6,169.20." U.S. Mot. at 11. Swift has repeatedly contested this calculation, most recently during the evidentiary hearing held on July 12, 2001. In her Memorandum on Potential Litigation Proceeds, which she filed on July 23, 2001, Swift explains that the FCA imposes treble damages, which, in this case, produces a net damage total of $18,507. *See* Relator's Mem. on Potential Litigation Proceeds at 1, 3. Additionally, she argues that the Court must impose multiple civil penalties on top of the damage award. *See id.* Specifically, Swift speculates that Defendant Cox submitted three separate week-long leave slips and that a civil penalty applies to each. *See id.* at 3. She also contends that the Court should impose civil penalties for both of the occasions on which Defendant Murphy allegedly submitted fraudulent time and attendance reports covering the period of the three-week vacation. She asserts that the Court should impose a sixth penalty for Cox's request for an annual leave conversion check inflated by the alleged fraud, a seventh for his endorsement and deposit of that check, and an eighth for the defendants' alleged conspiracy to commit the fraud. In other words, Swift accepts the Government's valuation of the underlying fraud ($6,169.20), but she argues that those damages must be trebled to $18,507 and that the Court should impose eight separate civil penalties of $10,000 apiece, resulting in a total possible recovery of $98,507. *See id.*[11]

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[11] Swift also argues speculatively that the Government may be able to recover reasonable attorneys fees and that prejudgment interest may be

The Court observes first that Swift has accurately portrayed the treble damage provision of the FCA. Under 31 U.S.C. § 3729(a), a person who defrauds the government in any of several enumerated ways is liable for "3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). Thus, in light of the Government's contention that the alleged misconduct defrauded it of $6,169.20, the Government stands to recover $18,507.60 even before the imposition of any applicable civil penalties.

Turning to the penalty portion of the Government's potential recovery, the Court finds that Swift has vastly overstated the number of individual penalties that may apply. As described in *United States v. Krizek*, 111 F.3d 934 (D.C. Cir.1997), the FCA imposes a civil penalty on each individual false claim. *Id.* at 938-39. The *Krizek* court explained that "[w]hether a defendant has made one false claim or many is a fact-bound inquiry that focuses on the specific conduct of the defendant." *Id.* at 939. In assessing the defendant's conduct, "[t]he Court asks, 'With what act did the defendant submit his demand or request and how many such acts were there?" *Id.*[12] For each fraudulent act, the FCA imposes "a civil penalty of not less than $5,000 and not more than $10,000." 31 U.S.C. § 3729(a).

The alleged fraud at issue in this case entails a single alleged misallocation of comp-time for a single vacation. To spin this single event into multiple fraudulent claims would

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available. *See* Relator's Mem. on Potential Litigation Proceeds at 1, 3. She does not, however, include any corresponding sums in the figure that she provides as an estimate of the government's possible proceeds. Accordingly, the Court does not consider them either when determining whether the government's pending motion to dismiss has merit.

[12] Swift has recognized the fact-based nature of this inquiry, observing that "[t]he emphasis is not on the number of documents, but on the number of 'bad acts' by a given defendant." Relator's Mem. on Potential Litigation Proceeds at 1 (citing *Krizek*, 111 F.3d at 939).

contort the civil penalty provisions unreasonably. While Swift's allegations do indeed describe fraud on the government, they describe only a single instance of fraudulent conduct. While Swift endeavors to break the single allegedly fraudulent act into a variety of separate claims, the Court finds that a fact-based assessment of the conduct at issue demonstrates that only a single civil penalty is warranted. Indeed, if Swift had alleged and demonstrated that Cox defrauded the government by using illegitimate comp-time to take several separate vacations, the Court might have concluded that separate civil penalties applied. In this circumstance, however, where only one alleged act of fraud underlies Swift's assertions, there can be no more than one civil penalty. Based on this conclusion, the Court finds that if Swift's allegations are true, the Government stands to recover $18,507.60 in trebled damages plus a single civil penalty of $5,000 to $10,000, resulting in a total potential recovery of $23,507.60 to $28,507.60.[13]

Having determined the scope of the Government's potential recovery, the Court returns to the two-step analysis described in *Sequoia Orange.* In the present dispute, the Government argues first that preserving scarce resources and taxpayer funds is a valid government purpose. Second, the Government maintains that the scope of the alleged fraud in this case does not justify the expense of litigation, and that its decision to seek dismissal of the suit is rationally related to that purpose. Following this line of argument and the two-step *Sequoia Orange* standard that it tracks, the Court first inquires whether the goal of preserving scarce resources and avoiding unnecessary taxpayer expense qualifies as a

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[13] Swift argues that the misconduct alleged in this matter is so severe that the Court should impose the maximum penalty of $10,000. *See* Relator's Mem. on Potential Litigation Proceeds at 2. The Court need not determine the value of any potential penalty because it finds that the Government's dispositive motion has merit regardless of the penalty's size.

legitimate government purpose. In its review of a comparable suit, the *Sequoia Orange* court expressly approved the trial court's determination that the Government had "legitimately considered] the burden imposed on the taxpayers by [the *qui tam*] litigation." *Sequoia Orange*, 151 F.3d at 1146; *see also Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 859 n.17 (recognizing that "fairly allocating scarce federal resources" qualifies as a "legitimate Government interest"); *Walker v. Bain*, ____ F.3d, ____ , 2001 WL 823612, *6 (6th Cir. 2001) (recognizing "the government's legitimate interest in protecting state and federal treasuries"). In keeping with this line of authority, the Court finds that preserving government resources and avoiding taxpayer expense qualify as a valid governmental purpose.

Turning to the second step of the *Sequoia Orange* inquiry, the Court assesses whether the act of dismissing this suit, in which the Government could recover $23,507.64 to $28,507.60, is rationally related to the valid purpose of preserving resources. For interrelated reasons, the Court finds that dismissal is rationally related to that valid government purpose. Primarily, the Government has explained in depth, both in its pleadings and during the evidentiary hearing, that this litigation would substantially drain scarce agency resources regardless of whether or not the Government actually intervenes).[14] The Government lists examples of the costs that the litigation would impose, including the cost of determining whether to intervene, complying with discovery requests even as a nonparty, monitoring the suit as a nonparty, negotiating and approving any settlement agreement,

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[14] As an illustration of the scarcity of its resources, the Government refers the Court to an excerpt from the United States Attorneys' Manual that Swift provided as an exhibit during the evidentiary hearing. The Manual states that DOJ's Civil Division takes authority over fraud actions and FCA cases only if the "amount of single damages, plus civil penalties, if any, exceeds $1,000,000." *See* Relator's Ex. 6 at 5 ¶ I.

considering and approving the relator's share of any recovery, determining whether to represent the defendants, and (possibly) actually defending them. The Government contends that all of these activities present an opportunity cost as well because every hour of time that a DOJ attorney spends on this suit is an hour less that the attorney can devote to other, more pressing matters. *Cf. Sequoia Orange,* 151 F.3d at 1 146 ("The district court . . . properly noted that the government can legitimately consider the burden imposed on the taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur *enormous internal staff costs.*") (emphasis added). In short, the Court finds that the Government has engaged in a valid cost-benefit analysis and concluded that the expense of litigation, as a party or non-party, would outweigh any potential recovery.[15] In light of DOJ's comparatively scarce monetary assets and its limited staff, and

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[15] The 1982 DOJ memorandum attached as an exhibit to Debbie Smith's declaration states that "a fraud involving less then [sic] $3,000 to $3,500 is probably de minimis for our purposes." See Smith Decl. Ex. 2 ¶ B(9). Adjusting for inflation, $3,504 in 1982 would amount to $6,225.41 in 1999, the year in which the Government filed the currently pending motion seeking dismissal because of the insubstantial value of the underlying fraud. *See* Inflation Calculator, *available at* http://www.westegg.com/infiation; *see also* NASA Inflation Calculators, *available at* http://wvwv.jsc.nasa.govlbu2linflate.html (using Consumer Price Index to adjust to $6,041 in 1999 dollars and the Employment Cost Index to adjust to $6,611 in 1998 dollars).

Notably, the 1982 memorandum's discussion of de minimis standards refers to the amount involved in the fraudulent act itself, not the amount that the Government might ultimately recover. *See* Smith Decl. Ex. 2 ¶ B(9). For purposes of its motion to dismiss, filed in 1999, the Government concedes (and Swift accepts) that Cox defrauded the Government of $6,169.20. Based on the standard set in 1982 and the impact that inflation has had in the intervening years (1999 de minimis value of $6,225.41), the fraud at issue in this case ($6,169.20) would probably qualify as de minimis.

considering the costs that this litigation would impose on the agency whether or not the Government were to intervene, the Court finds that the decision to seek dismissal is rationally related to the valid government purpose of preserving resources.

In support of its conclusion that the Government's cost-benefit analysis is valid, the Court notes that the Government operates with sweeping discretion when determining whether and how to proceed in particular cases. As the Supreme Court explained in somewhat analogous circumstances in *Heckler v. Chaney*, 470 U.S. 821 (1985),

> [A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability far judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831-32 (internal citations omitted). This wide-ranging discretion applies in the context of *qui tam* actions like this one. While acknowledging that the FCA does not articulate the circumstances in which the Government may dismiss a suit, the Ninth Circuit has noted that "the decision to dismiss

[a *qui tam* action] has been likened to a matter within the government's prosecutorial discretion in enforcing federal laws." *Sequoia Orange*, 151 F.3d at 1 143 (citing *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 756 (9th Cir.1993)). This Court, like others before it, "will not assume that the *qui tam* provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General." *Juliano v. Fed. Asset Disposition Assn*, 736 F.Supp. 348, 351 (D.D.C. 1990), *aff'd*, 959 F.2d 1101(D.C. Cir.1992); *see also United States ex rel. Killingsworth v. Northrop Corp.*, *25* F.3d 715, 724 (9th Cir.1994). Accordingly, the Court's review of the Government's cost-benefit analysis, and the Court's conclusion that the Government has satisfied the two part *Sequoia Orange* standard, is infused with the broad deference that courts afford the attorney general in *qui tam* actions.

As described above, the two part *Sequoia Orange* standard does not constitute the entire analysis applicable to motions to dismiss filed by the Government in *qui tam* suits. Where, as here, the Government has demonstrated that dismissal is rationally related to a valid government purpose, the burden shifts to the relator to establish that the Government's decision to seek dismissal is fraudulent, arbitrary and capricious, or illegal. *See Sequoia Orange*, 151 F.3d at 1145. In this action, Swift argues that the government has acted arbitrarily and capriciously by failing to actually investigate her allegations at all. Because the FCA states that "the Attorney General diligently shall investigate" false claims, *see* 31 U.S.C. § 3730(a), and because the Government has not engaged in any actual investigation in this matter, Swift asserts that the pending motion to dismiss must be denied. *See, e.g.*, Relator's Opp'n Mem. at 8-12.

The Court disagrees. First, as described in greater detail above, the FCA does not limit the Attorney General's prosecutorial discretion in any meaningful way. Thus, the

Government's decision simply to assume that the fraud occurred and to base its litigation strategy on that assumption is largely immune from this Court's review. Second, if, as Swift urges, the Government were to investigate every single allegation of fraud that putative relators raise, it would be entirely underequipped to investigate any of them "diligently." In light of the resource restraints that beset DOJ, a blanket investigation requirement of the type that Swift envisions would spread the agency's funds and staff so thin that it would be unable to conduct any of the investigations effectively. Because of DOJ's scarce resources and the multitude of obligations that it must address, the Attorney General must selectively exercise his prosecutorial discretion in determining which actions and allegations merit full attention.

Further, with respect to the particular allegations contained in Swift's Amended Complaint, ongoing investigation could uncover nothing more than that which the Government has already conceded for purposes of its pending motion. Because the Government has conceded, *arguendo,* that the alleged fraud occurred, a thorough investigation could not possibly do more to establish that Swift's allegations have merit. Notwithstanding the Government's complete (albeit provisional) concession that the fraud occurred, Swift repeatedly states and implies that further investigation is warranted because it would uncover other similar acts of fraud. The Court notes, however, that Swift has completely failed to allege any such ancillary fraud with any sort of particularity in her Amended Complaint. Thus, to the degree that she asserts that her Amended Complaint encompasses such hunches of fraud, the Court finds that she has failed to satisfy the particularized pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."), *see also United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 655 n.10 (D.C. Cir.1994)

(recognizing the district court's authority dismiss bare allegations of fraud in a *qui tam* action for failure to plead with particularity); *United States ex rel. Cianci v. Columbia/ HCA Healthcare Corp.*, Civ. Action No. 00-2581, slip op. at 3 (D.D.C. filed July 6, 2001) (RCL) (determining that a *qui tam* "relator's allegation of fraud [must] comply with Federal Rule of Civil Procedure 9(b)").

Swift is simply not entitled to deploy the federal government as a free investigative service merely by invoking the FCA and announcing that she thinks something fishy is going on. She may not "run to the government with only a suspicion of fraud in the hope that [she] might later be able to win relator status by riding piggyback on information subsequently developed by a government investigation." *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F.Supp. 1010, 1022 (E.D. Va.1995). Congress did not enact the FCA to compel "government agencies [to] pursu[e] fishing expeditions at the behest of suspicious citizens" or to serve "as a sort of free private investigator." *Id.* Accordingly, Swift may not enlist the federal government to investigate her gossamer allegations in circumvention of Rule 9. To the extent that Swift raises claims of fraud other than her allegation relating Defendant Cox's three-week vacation, her claims merit dismissal under Rule 9, and the government has no obligation to investigate. Thus, Swift's argument regarding the scope of the Government's investigation does not demonstrate that its decision to seek dismissal of the case is arbitrary and capricious, fraudulent, or illegal.

III. CONCLUSION

For the foregoing reasons, the Court finds that Government has identified a valid government purpose—preserving scarce resources—and that its decision to seek dismissal of this *qui tam* action is rationally related to that purpose. Furthermore, the Court concludes that Swift has failed to establish that the

decision to seek dismissal is fraudulent, arbitrary and capricious, or illegal. Accordingly, the Court shall grant the Government's motion to dismiss and dismiss Swift's Amended Complaint with prejudice. An Order accompanies this Memorandum Opinion.

July 30, 2001

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

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APPENDIX C

THE FEDERAL FALSE CLAIMS ACT
31 U.S.C. §§ 3729-30

3729. False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the

Government, is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [Title 26, USCS].

3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at

least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for

filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to

have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress,

a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

APPENDIX D

PRIVILEGED AND CONFIDENTIAL

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January 19, 1999

Ms. Wilma Lewis
United States Attorney for the
District of Columbia
United States Attorney's Office
Judiciary Center Building
555 Fourth Street, NW
Washington, DC 20001

Re: Disclosure Statement Under False Claims Act, 31 U.S.C. § 3730(b)

Dear Ms. Lewis:

Please be advised that this disclosure statement, made under the False Claims Act, contains confidential and privileged information that is being provided to the United States Gov ernment as a joint party with common interests. It contains the mental impressions, conclusions, opinions and legal theories of the *pro se* Relator, who is serving as her own attorney.

DISCLOSURE STATEMENT

Introduction:

This is a disclosure statement made pursuant to Title 31 U.S.C. § 3730(b)(2) for violations of Section 3729(a) of the False Claims Act. I am an attorney licensed to practice in the State of New York. From February 1992 until December 1992, I was on active-duty status as an attorney-advisor in the U.S. Justice Department's Office of Legal Counsel ("OLC"). I have direct and independent knowledge of the violations described below, based on incriminating admissions made directly to me by one of the perpetrators and partially corroborated by the statements of two other individuals, and I am voluntarily providing this information to the Government.

Parties:

Timothy E. Flanigan, a resident of the State of Virginia, was appointed Assistant Attorney General for OLC by President Bush in 1992. His term of office expired at noon on January 20, 1993 with the first inauguration of President Clinton. Since that time, Flanigan has been with the Washington, D.C. office of the law firm Jones, Day, Reavis & Pogue. His business and residential addresses and phone numbers are:

Timothy E. Flanigan
11748 Thomas Avenue
Great Falls, VA 22066

Timothy E. Flanigan
Jones, Day Reavis & Pogue
1450 G Street, NW
Washington, DC 20005
202-879-3939

Douglas R. Cox, a resident of the State of Maryland, was initially employed as a career civil servant in OLC. Subsequently he was appointed Deputy Assistant Attorney General and then, in 1992, Principal Deputy Assistant Attorney General for OLC by Attorney General William Barr. His term of office expired at noon on January 20, 1993 with the first inauguration of President Clinton. Since that time, Cox has been with the Washington, D.C. office of the law firm Gibson, Dunn & Crutcher. His business and residential addresses and phone numbers are:

Douglas R. Cox
12711 River Road
Potomac, MD 20854
301-926-5085

Douglas R. Cox
Gibson, Dunn & Crutcher
1050 Connecticut Ave., NW
Washington, DC 20036
202-955-8500

Kathleen O. Murphy, a resident of the State of Maryland, became Executive Officer of OLC in 1986 and—to the best of my knowledge—remains in that position today. She serves as OLC's financial officer and is responsible for the financial management of the office. At this time, I have no information regarding her residential address or phone number. She can be reached, however, at her place of employment:

Kathleen O. Murphy
U.S. Department of Justice
Office of Legal Counsel
950 Constitution Avenue, NW
Washington, DC 20530-0001
202-514-2000

The person who submitted false records to the federal government—in this case falsified employee time sheets and leave slips—was Murphy, OLC's Executive Officer. The claims were submitted on behalf of and with the knowledge of Cox, former Principal Deputy Assistant Attorney General for OLC. Their supervisor Flanigan—then Assistant Attorney General for OLC—was told of this activity and, upon information and belief, did nothing to remedy the situation.

The submission of these fraudulent records allowed Cox to accrue annual leave to which he was not entitled. When Cox left the federal government upon the expiration of his term of office at noon on January 20, 1993, upon information and belief, Cox requested and was paid the cash equivalent of his unused annual leave—including the annual leave which he had fraudulently obtained through Murphy's submission of falsified time sheets and leave slips.

As a result of reporting to Flanigan my concerns about the submission of falsified time sheets and leave slips, Flanigan, Cox and Murphy sought to discredit, intimidate, harass and silence me. Upon information and belief, they engaged in the above-described measures, among others, in order to shift scrutiny to me and away from them so as to conceal the fraudulent activity.

Narrative Account of the Fraud:

B. OLC's Policy Regarding Compensatory Time

In 1992, when I served as attorney-advisor in the Office of Legal Counsel, OLC participated in DOJ's compensatory time (hereinafter "comp-time") program, which gives eligible employees a nonmonetary form of recompense for overtime hours. The comp-time program allows the employees of participating DOJ units to accrue overtime hours which can then be used in lieu of sick leave or annual leave.

The practice in OLC was that each attorney would keep track of his or her own comp-time hours. On a weekly basis, the hours were submitted to Murphy, who was responsible for handling OLC's employee time sheets and leave slips.

OLC's comp-time policy with respect to regular workdays was to permit the accrual of only those overtime hours worked after 7:00 p.m. Because most of the Office's attorneys took an hour for lunch, they could begin to accrue comp-time after working a 9-hour day.

B. Murphy's Admissions Regarding Violation of the Comp-Time Statute, 5 U.S.C. § 5543, and OLC Comp-Time Policy By Herself, Cox, and Others in OLC

One day in summer of 1992, I commented to Murphy that OLC's comp-time policy was unfair as applied to me because of my work schedule. I regularly arrived at the office at 8:00 a.m. and worked through lunch and, therefore, I could not begin to accrue comp-time until I had worked an 11-hour day. Murphy agreed that the policy was unfair and stated that, under DOJ rules, I was entitled to comp-time for every hour I worked beyond an 8-hour workday. She suggested that I submit my weekly record of comp-time hours under the Department's 8-hour rule, rather than OLC's 7:00 p.m. policy.

When I rejected Murphy's suggestion that I disregard stated OLC policy, Murphy informed me that other OLC employees had rejected OLC's 7:00 p.m. policy in favor of DOJ's 8-hour workday rule. I balked again, stating that it was wrong to violate OLC policy even if that policy was inconsistent with DOJ rules. I stated that the proper approach would be to raise the issue directly with OLC management, an action I was unwilling to pursue for fear of antagonizing my superiors.

Murphy then stated that I should not be concerned about antagonizing my superiors, because some of them were also disregarding comp-time policy. When I asked Murphy to explain, she stated that Principal Deputy Assistant Attorney

General Douglas R. Cox had complained to her that a government rule excluding Senior Executive Service employees such as himself from the comp-time program was unfair, because he worked very long hours.* Murphy then stated to me that she agreed with Cox; therefore, she compensated him for the long hours he worked by not deducting annual leave from his annual leave account when he was out of the office on vacation. Murphy specifically mentioned that Cox had once been on vacation for 3 weeks and that she had not debited his annual leave account for any of this time.

I was surprised to learn of this activity and even more surprised that Murphy divulged it to me. At this point, I brought the conversation to a close by stating that, regardless of what others in the office did, I was personally uncomfortable with the idea of disregarding OLC's 7:00 p.m. comp-time policy. While troubled by these admissions, I did not deem it necessary to take immediate action because the annual leave hours were simply accumulating in Cox's account.

C. Corroborating Evidence That Murphy Falsified Time Sheets and Leave Slips

Several months later, I happened to have a conversation with an OLC career paralegal—Jackie Jennings—about Murphy's work hours and habits. Jennings stated that, when Murphy had spent time away from OLC for maternity purposes several years earlier, she had noticed that Murphy's paperwork claimed comp-time, rather than annual leave, sick leave, or other leave. Jennings thought this unusual in light of the fact that Murphy rarely worked overtime hours. These comments

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* 5 U.S.C. § 5541(2)(xvi) excludes members of the Senior Executive Service from the definition of "employee" for purposes of the statute authorizing the comp-time program.

prompted me to share with Jennings the admissions made by Murphy regarding her handling of Cox's comp-time and annual leave.

D. Reporting the Fraudulent Activity to Flanigan

In November of 1992, President Bush lost his bid for re-election and, because Cox was a political appointee, I knew he would be leaving OLC effective noon on January 20, 1993—Inauguration Day. It was my understanding that federal employees could convert unused annual leave hours to their cash equivalent when they left the employ of the government. Recalling my earlier conversation with Murphy, I realized that Cox would leave DOJ with an annual leave conversion check in an amount significantly greater than that to which he was entitled. I was thus placed in the uncomfortable position of not wanting to complain about a supervisor, but believing that I had a legal and ethical obligation to do so.

On December 11, 1992, I met with Flanigan and, among other things, reported to him that Murphy did not deduct annual leave from the account of one of his deputies when that deputy was on vacation. I could clearly see that this statement had an impact on Flanigan. He responded that Murphy had offered him a similar leave arrangement, but that he had declined. Flanigan also told me that he wasn't troubled by what I had told him.

E. Attempts to Discredit, Harass, Intimidate and Silence to Draw Attention to Me and Away from the Fraudulent Conduct

Unbeknownst to me, Murphy started to keep a secret, locked file documenting all of her conversations with me. It was only later that I discovered the existence of this secret file.

Flanigan asked Cox to monitor my word processing files, many of which were locked with a password, over the Office's "LAN" or local area network. Murphy assisted by eliciting from me information that might reveal the password that would unlock these files.

Sometime between December 17, 1992 and December 19, 1992, Cox successfully guessed the password protecting many of the word processing files on my OLC personal computer. This effort was wholly unnecessary and deceitful as I would have had to open my locked files to my supervisors had they but asked for access.

Having broken into my password-protected word-processing files, Cox discovered, among other things, copies of several documents that I had not worked on. On the morning of December 20, 1992, after reviewing my password-protected word processing files, Flanigan caused me to be removed from the OLC computer system so that I could no longer access any of my documents--personal or otherwise.

When I discovered later that same afternoon that I could not "log-on" to my computer, I went to Flanigan's office. He suggested that I had "leaked" the documents on which I had not worked to the incoming Clinton Administration prior to the January 20, 1993 inauguration. I assured him that I had not improperly divulged OLC documents to the Clinton Transition Team and Flanigan stated that he believed me.

Nevertheless, Flanigan told me that he was referring the matter to DOJ's Office of Professional Responsibility for investigation. To my great surprise, he also indicated that I might be terminated; however, he was willing to first give me an opportunity to resign and, if I did so, he would fix it so that no one in OLC would ever say anything about the matter. He also told me that I would probably have to take a polygraph test for OPR. Knowing that I had done nothing wrong,

and knowing that I was being supported for a political appointment in OLC in the Clinton Administration, I declined to resign.

On the very next day, December 21, 1992, Flanigan told me, inaccurately, that OPR wanted to open an investigation into my conduct and that OPR had suggested that I be placed in a non-duty (with pay) status in the interim. (Actually, it was Flanigan who requested the OPR investigation and who sought to get me out of the Office involuntarily by insisting I be placed in non-duty status.) With that, Flanigan relieved me of on-duty status and told me to go home.

In a telephone conversation the next day, December 22, 1992, Flanigan told me that I should not contact OPR Counsel Michael E. Shaheen, Jr. as it could "hurt" my case, and that OPR would be in touch with me about the investigation schedule.

At a later date, Flanigan told my attorney—even before the OPR "investigation" had been concluded—that I should resign and that, if I did so, he would be glad to serve as a reference for me as he always had thought highly of my work.

On January 19, 1993, OPR informed Flanigan that, on the charge that he had asked OPR to look into, its investigation was complete and its conclusion was that I had not done anything wrong with respect to those allegations. However, during the investigation, I voluntarily disclosed that I had once allowed my spouse—a public sector attorney—to see two draft executive orders that I thought had most likely been published; on that basis, OPR concluded that I had exercised bad judgment, but did not recommend termination as a penalty.

Nevertheless, on that very evening—his last day in office—Flanigan formally proposed that my employment with DOJ be terminated and that I be continued in non-duty status while higher-ups in DOJ decided my fate. Being on non-duty status

and banned from the Main Justice Building made it extremely difficult for me to informally speak with those higher-ups and explain exactly what was going on.

G. The Fraud Falls Between the Cracks

Although Flanigan and Cox departed DOJ in the aftermath of the Inauguration, Murphy and the DOJ bureaucracy took up the cause against me with a vengeance. The saga of my terrible ordeal is not relevant to this referral, except to the extent that it demonstrates the extreme lengths the perpetrators and their allies were willing to go to in order to keep me silenced.

My attorneys and I tried repeatedly to explain that the proposed disciplinary action against me was a contrived sham; nevertheless, Flanigan, Cox and Murphy had succeeded in diverting attention to me and away from themselves. Regrettably, I was forced to bring legal action against DOJ to clear my name. Eventually, I was able to do so.

Sometime during the course of the disciplinary proceeding the newly-appointed Assistant Attorney General for OLC—Walter Dellinger—must have learned of my allegations concerning the fraudulent time sheets and leave slips. By June of 1993, he had instituted a formal system for tracking comp-time.

Amazingly, in *Swift v. Department of Justice*, DC-1221-95-0575-W-1, an action before the MSPB under the Whistleblower Protection Act, Murphy submitted an affidavit admitting that she had credited Cox with comp-time: "I recall that DAAG Cox in particular worked many, long days, and *had therefore accrued many hours of compensatory time.* As a result, *I was able to credit him with a combination of his accrued compensatory time and annual leave.*" To my knowledge, however, no action was ever taken to recoup the Government's financial loss or to punish the perpetrators.

Relevant Statutes:

A. The False Claims Act

The False Claims Act, originally enacted during the Civil War, was substantially amended by Congress in 1986. These amendments were intended to enhance the government's ability to recover losses sustained as a result of fraud against the United States; they were also intended to create incentives for individuals who are aware of fraud against the government to disclose that information without fear of reprisals or the prospect of government inaction.

As amended, the False Claims Act ("the Act") provides that anyone who, with the requisite knowledge, submits to the United States a false or fraudulent claim for payment is liable for three times the amount of damages sustained by the government, as well as a civil money penalty of between $5,000 and $10,000 for each claim. In addition, the Act expressly prohibits any retaliatory action against individuals performing their duty to report fraud on government. The Act allows individuals having knowledge of a false claim against the government to bring an action in federal district court on behalf of the United States, to share in the damages and the civil money penalties awarded against the Defendants, and to recover double damages themselves for any unlawful retaliation.

Section 3729 of the Act provides in pertinent part that:

(a) Any person who—

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for approval;
>
> (2) knowingly makes, uses, or causes to be used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . .

. . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains . . .

(b) [T]he terms "knowing" and "knowingly" mean that a person, with respect to information—

> (1) has actual knowledge of the information;
>
> (2) acts in deliberant ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent is required.

B. 5 U.S.C. § 5543—Compensatory Time Off

Section 5543 provides in pertinent part:

> (a) The head of an agency may—
>
> (2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 . . . shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

For purposes of section 5543, the term "employee" does not include a member of the Senior Executive Service. 5 U.S.C. § 5541(2)(c)(xvi).

Section 5543, read in conjunction with section 5541, has been interpreted to mean that SES members are not entitled to participate in the comp-time program. For example, in analogizing credit hours to comp-time, OPM has stated:

> In 1986, the Director of OPM sent a memorandum to heads of agencies stating that the use of credit hours . . .

> was *inappropriate for SES members, since they are not entitled to . . . compensatory time off. . . .* One agency noted that . . . the *prohibition on the use of overtime hours (and, consequently, compensatory time) by SES members* has no bearing on [credit hours].

58 Fed. Reg. 58259-60 (Nov. 1, 1993).

False Claims Act Violations:

Murphy—Murphy violated Section 3729(a)(1) of the False Claims Act because she knowingly submitted a false claim (the time sheet and leave slip) for approval and eventual payment to Cox. She also violated Section 3729(a)(2) because she knowlingly made and used a false record or statement to get a claim paid. Finally, she violated Section 3729(a)(3) because she conspired with Cox—and possibly Flanigan—to defraud the Government by getting a false claim paid.

She clearly had knowledge that Cox was not entitled to comptime because she (1) admitted it to me in conversation and (2) must have known or should have known in light of her responsibility as OLC's financial officer. It is also clear that she submitted false records because she (a) admitted it to me in conversation and (2) admitted it again, in writing, in her affidavit in *Swift v. Department of Justice.*

Cox—Cox violated Section 3729(a)(3) of the False Claims Act by conspiring with Murphy to defraud the Government by taking the first step toward getting a false claim allowed—submission of fraudulent time sheets and leave slips. Cox would have known from the statement of earnings and leave that he receives every pay period that Murphy had not properly debited his annual leave account. The second and final step was taken early in 1993 when, upon information and belief, Cox asked the Government to award him cash compensation for his unused annual leave when he left OLC at the end of the Bush Administration.

Flanigan—Flanigan violated Section 3729(a)(3) of the False Claims Act by conspiring with Murphy and Cox to get the fraudulent claim paid. He did this, at least in part, through his role in silencing me and diverting attention away from Cox and Murphy.

The United States, unaware of the foregoing circumstances, and in reliance on the false and fraudulent claims and statements, authorized the payment of money to Cox. As a result, the United States has been damaged.

Potential Witnesses:

1. OLC paralegal Jacqueline Jennings: She may still be at OLC. Based on the conversation she had with me, described in detail above, I expect that she has information regarding Murphy's comp-time fraud, and possibly other conduct in violation of Department rules, such as improper use of Government vehicles for personal reasons.

2. Murphy's Assistant Kevin Smith: He is probably still at OLC. During my tenure in the Office, he served as Murphy's right-hand person and was privy to much of her improper behavior.

Conclusion:

I realize that the amount of money fraudulently obtained from the United States in this case is relatively small compared with the fraud committed by corporate entities doing business with the U.S. Department of Defense, for example. Nevertheless, I believe that there are important public policy reasons that justify pursuing this matter diligently.

First, Flanigan and Cox are attorneys who have served at the highest levels of the Justice Department. As such, they had and have a special obligation to maintain the highest levels of honesty and integrity. That they can participate in such a

scheme and remain unpunished is simply unacceptable. It is difficult to fathom that such conduct would be tolerated in a lower-level employee.

Second, Murphy remains in her position at OLC. While it is my understanding that steps have been taken to prevent further fraud with respect to comp-time, I believe it unlikely that she was disciplined for this conduct. Based on known facts, it is reasonable to assume that she encouraged not only Flanigan and me (and probably Cox) to submit falsified time sheets and leave slips, but others as well. Jackie Jennings' comment to me indicates that Murphy may also have submitted falsified time sheets and leave slips for herself.

As OLC's financial officer, Murphy's participation in—indeed, encouragement of—this type of fraud demands serious consequences. Murphy's affidavit demonstrates just how comfortable she had become with this regular fraud; she casually admits on the record that she credited Cox with comp-time for at least a portion of his 3-week vacation. The Justice Department must demand more from its financial officers and the U.S. Attorney's Office should send a strong signal that this type of conduct will not be tolerated.

Third, I suffered severe, public harassment for investigating Murphy and Cox's fraud and bringing it to the attention of Flanigan. Although it is not the province of the U.S. Attorney's Office to remedy such harassment, allowing Flanigan, Cox and Murphy to go unpunished and Cox to benefit from the fraud under these circumstances sends the wrong message to other Justice Department employees. Having seen the torment I was made to suffer, no employee will ever come forward to expose fraud within the Department. And that is a disgrace. If the U.S. Justice Department—of all places—will not see that justice is done within its own corridors, how can the public have confidence in our mission?

In light of recent criticism of the Department and its Offices, Bureaus and Divisions, it is more important than ever that federal law enforcement personnel are not seen by the public as above the law. Moreover, line attorneys and support staff must know that Justice Department managers are required to play by the same set of rules--and that they will be punished accordingly when those rules are violated.

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Currently, I am on detail from the U.S. Justice Department's Environment & Natural Resources Division to Habitat for Humanity International. I can be reached at the address and phone number appearing on the letterhead.

Sincerely,

/s/ Susan J. Swift
SUSAN J. SWIFT
Relator *pro se*

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